STUDENTS AND WORK
Legal Information Paper

Background

Students may participate in the workforce in one of a number of ways:

- on a vocational/professional placement;
- as an employee;
- as a volunteer; or
- with a combination of employment and training (such as apprentices).

The issues of work experience, exploitation of students, breach of the Fair Work Act 2009 (Cth) (‘FWA’) by host employer organisations and complicity by educational authorities of breaches of the FWA were discussed in the in the report to the Fair Work Ombudsman in January 2013 published by the University of Adelaide.


Students may be required to perform an ‘internship’, ‘work experience’, or ‘work integrated learning’ component. However, this is just terminology. It does not matter what the parties call the arrangement in a written agreement or otherwise. If investigated, the Fair Work Ombudsman will look at the individual facts of the case and whether the arrangement meets the criteria under the FWA to be a genuine vocational placement. Students can only be classified as undertaking either:

(a) a vocational placement as defined in the FWA (which can be unpaid if all criteria or met); or
(b) they are employees.

In limited circumstances (see below), they may be classified as volunteers.

Categories of Work

Professional/Vocational Placement

Students who undertake an unpaid placement, work experience or an internship which is compulsory or an elective component of an RMIT program, course or subject are defined under s.15 of the FWA as undertaking a ‘vocational placement’.

Section 12 of the FWA defines “vocational placement” to mean:

“a placement that is:

1. undertaken with an employer for which a person is not entitled to be paid any remuneration; and
2. undertaken as a requirement of an education or training course; and
3. authorised under a law or by an administrative arrangement of the State/Territory or Commonwealth government.”

Accordingly, there are 3 requirements that must be met, otherwise the student will be deemed under the FWA to be an employee with the organisation.

Firstly, the student must not be entitled to a payment; secondly, the vocational placement must be a requirement of an RMIT course; and finally, the placement (which is part of the course) must be authorised in writing by the relevant Victorian or Commonwealth departments/educational
authorities (such as TEQSA for higher education or ASQA for TAFE courses), or be compliant with the relevant guidelines for self-accrediting institutions.


If the placement does not satisfy all three requirements then the student will be deemed an employee under the FWA. The effect of this is that the student will be entitled to be paid minimum wages, annual leave and possibly superannuation as well as the protections afforded to employees under the FWA.

Whether the student is on a vocational placement and exempt under the FWA, or is an employee, employers will still be bound by other legislation including workers compensation laws, OH&S and discrimination.

To manage the potential legal risks associated with RMIT facilitating unpaid placements, RMIT must ensure that the abovementioned 3 requirements are met and must also enter into a practical placement agreement with the host organisation. In some circumstances, the host organisation may require the student to enter into a separate agreement.

http://rmit.edu.au/browse;ID=imxrwtkh9ow (note staff login required)

**Employee**

Students who undertake work placements in an organisation where one of the 3 requirements is not met – are deemed by the FWA to enter into an employment relationship.

As such, the employer must comply with the FWA and also the relevant enterprise agreement or Modern Award (Award) that applies to that industry and type of work. The employer must pay the student the wages specified in the relevant Award (usually by reference to the grade or years of experience) commensurate with their skill and qualifications.


RMIT should not condone or be complicit in host organisations exploiting its students. RMIT should ask the employer which is the applicable Award, and then enquire as to the student’s wage and the basis of that calculation. If the employer does not pay wages to the student in accordance with the applicable award, then the employer may be in breach of the Award and the FWA, and RMIT is complicit in that breach.

The Fair Work Ombudsman has broad powers to investigate a complaint about an alleged contravention of the FWA. Financial penalties can be imposed on employers who contravene the FWA.

Unpaid work trials are generally against the law. Employees must be paid for all the time they are at work including time for meetings and training.

**Students as Volunteers**

Unpaid activities undertaken by a student may be classified as volunteer activities.

Whether an individual is a volunteer is a question of fact based on a set or circumstances. The following factors are relevant to determine whether the relationship would be one of employment or volunteering:

- The activity has always been performed in a voluntary capacity in the past
- Students do not expect to be paid for the activity
- The activity is not one which would normally be performed by staff members if students were not engaged as volunteers
Each of the above requirements must be satisfied to be categorised as a volunteer for the purposes of the FWA.

The following factors are also relevant to ensure that the activity is truly voluntary:

- The activity involves minimal time commitment. Generally the longer the placement, the more likely the person is an employee.
- There is no obligation to achieve a work output.
- The activity provides a benefit to the student through personal development or the broader community. If a business is gaining significant benefit as a result of engaging the student, this may indicate an employment relationship as formed. Unpaid work experience/volunteering is less likely to involve employment if they are primarily observational.
- The activity will not necessarily lead to employment.

If any of the above factors do not apply to the activity, RMIT should request that the organisation modify the activity to ensure that the role is clearly voluntary.

Where RMIT is involved in arranging volunteer roles for students, it should familiarise itself with all relevant matters set out at the ‘Volunteering Australia’ web page. http://www.volunteeringaustralia.org/html/s01_home/home.asp

**Student as Apprentices and Trainees**

Apprentices and trainees do a combination of work and recognised training to obtain a qualification, certificate or diploma. An employee is classified as an apprentice or trainee if their training is through a registered state or territory training authority or under a relevant law. Apprentices’ pay scales are determined by the relevant pay scale for that apprenticeship and the year of training.

**International Students**

International students must ensure that when they undertake a workplace arrangement that they comply with their visa conditions.

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